APPENDIX A — SUMMARY ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED AND FILED DECEMBER 29, 2004

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 29th day of December two thousand and four.

Present: JON O. NEWMAN,
ROSEMARY S. POOLER,
ROBERT A. KATZMANN,

Circuit Judges.

No. 04-1161

BERNADETTE FULLER,

Plaintiff-Appellant,

ORTEZ TAYLOR, and all others similarly situated,

Plaintiffs,

-v-

INSTINET, INC.,

Defendant-Appellee.

Appendix A

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of said District Court be and it hereby is **AFFIRMED**.

Plaintiff-appellant Bernadette Fuller appeals from a judgment of the district court granting summary judgment to defendant-appellee Instinet, Inc. on her various claims premised on racial discrimination. On appeal, Fuller challenges the November 28, 2001 order of the district court denying certification of a proposed class of black and Hispanic employees of Instinet, the portion of the January 29, 2004 order of the district court denying Fuller's motion for discovery of the names and addresses of all potential class members, and the portion of the January 29, 2004 order of the district court granting summary judgment to Instinet on Fuller's retaliation claims under Title VII and 42 U.S.C. § 1981. We assume the parties' familiarity with the facts, proceedings below, and specification of issues on appeal.

Fuller first challenges the district court's denial of class certification on the grounds that the statistical study she offered as evidence of discrimination was not probative of discrimination, and that she could not represent a class containing Hispanic employees. Denial of class certification is reviewed for abuse of discretion, but with less deference to the district court than when certification has been granted. *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283, 291 (2d Cir. 1999). The party moving for class certification has the burden of showing numerosity, commonality, typicality, and adequacy. Fed. R. Civ. P. 23(a); *Caridad*, 191 F.3d at 291.

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We note that Supreme Court precedent indicates that a black lead plaintiff can represent a class containing Hispanic employees when a general racial discrimination manifests itself in the same way against both black and Hispanic employees. *See General Tel. Co. v. Falcon*, 457 U.S. 147, 159 n.15 (1982); *Rossini v. Ogilvy & Mather, Inc.*, 798 F.2d 590, 598 (2d Cir. 1986). To demonstrate such discrimination, Fuller's sole evidence was a statistical study of job titles and salaries that failed to take into account any variables other than race. Statistical studies can establish a class and even a prima facie case of discrimination. *Caridad*, 191 F.3d at 292; *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 (1977). However, failure to account for relevant non-discriminatory factors can reduce the probative value of statistical analyses. *Bazemore v. Friday*, 478 U.S. 385, 400 (1986) (per curiam); *Sainte Marie v. Eastern R.R. Ass'n*, 650 F.2d 395, 400 (2d Cir. 1981); *compare Caridad*, 191 F.3d at 288 (reversing denial of class certification supported by statistical study accounting for non-discriminatory factors despite other potential flaws) *with Sheehan v. Purolator, Inc.*, 839 F.2d 99, 103 (2d Cir. 1988) (affirming denial of certification supported by statistical study that did not account for non-discriminatory factors). We hold that Fuller's failure to include any relevant non-discriminatory factors in her statistical study left it without probative value, and that she therefore failed to carry her burden under Federal Rule of Civil Procedure 23(a).

Fuller next argues that the district court, having denied class certification, had a duty to ensure that potential class members were notified of that decision by ordering the disclosure of names and addresses of potential class members.

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We review a district court's discovery rulings for abuse of discretion. *Wills v. Amerada Hess Corp.*, 379 F.3d 32, 41 (2d Cir. 2004). Federal Rule of Civil Procedure 23(e), as it read prior to the December 1, 2003 amendment, required that "notice of [any] proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs." By its terms, former Rule 23(e) does not require notice to potential class members on a denial of class certification. In support of her position, Fuller cites *Culver v. City of Milwaukee*, 277 F.3d 908 (7th Cir. 2002). *Culver* read a notice requirement into former Rule 23(e) for class decertification, and in dicta supported such a requirement for denial of class certification. *Id.* at 914. We decline to adopt the rule or reasoning of *Culver* in light of the plain language of former Rule 23(e). *See, e.g., Maddox & Starbuck, Ltd. v. British Airways*, 97 F.R.D. 395, 397 (S.D.N.Y. 1983).

Fuller finally argues that the district court erred by awarding summary judgment to Instinet on her retaliation claim. We review a grant of summary judgment de novo. *Morales v. Quintel Entm't, Inc.*, 249 F.3d 115, 121 (2d Cir. 2001). Summary judgment is appropriate if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). To state a retaliation claim, a plaintiff must show that she engaged in protected activity, suffered some adverse employment action, and a causal connection exists between the two. *Slattery v. Swiss Reinsurance Am. Corp.*, 248 F.3d 87, 94 (2d Cir. 2001). An adverse employment action is a "materially adverse change in the terms, privileges, duration and conditions of

employment." *Treglia v. Town of Manlius*, 313 F.3d 713, 720 (2d Cir. 2002).

Fuller identifies two instances of retaliation: 1) the "corporate mobilization" against her in January 1999, consisting of three emails establishing some monitoring of Fuller's performance, and 2) Fuller's "scathing and derogatory" performance review of August 1999. We do not believe that monitoring, standing alone, changes the terms, privileges, duration or conditions of employment. As to Fuller's performance review, it was average, both in its numerical ratings and in its balance of positive and negative comments. *See Richardson v. New York State Dep't of Corr. Serv.*, 180 F.3d 426, 443-44 (2d Cir. 1999) (holding that an average evaluation is not, standing alone, an adverse employment action). Fuller argues that the mid-year timing of the evaluation was unprecedented, but at oral argument Instinet explained that the change in timing was part of a department-wide program. We therefore hold that Fuller has failed to identify any adverse employment action and that summary judgment was appropriate.

We have considered Fuller's other arguments and find them to be without merit.

For the above reasons, we affirm the judgment of the district court.

FOR THE COURT:
ROSEANN B. MACKECHNIE, Clerk
By: s/ Lucille Carr

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED JANUARY 26, 2004

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT

99 Civ. 11453 (BSJ)

BERNADETTE FULLER,

Plaintiff,

v.

INSTINET, INC.,

Defendant.

ORDER

BARBARA S. JONES
UNITED STATES DISTRICT JUDGE

Plaintiff Bernadette Fuller, an African American, brings this action against Instinet, Inc. ("Instinet"), her former employer, alleging that Instinct discriminated against her based on her race by creating a hostile work environment, failing to promote her, and retaliating against her, in violation of 42 U.S.C. § 1981; Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, and the New York State Human Rights Law, N.Y. Exec. Law § 296.

Appendix B

Before the Court are two motions: (1) Plaintiffs motion to compel the production of certain information; and (2) Defendant's motion for summary judgment. For the reasons set forth below, the Court DENIES Plaintiff's motion to compel certain information and GRANTS Defendant's motion for summary judgment.

BACKGROUND

The following facts are either undisputed or are alleged by Plaintiff.

Plaintiff Fuller was hired as a marketing specialist in the Clearing Support Services Department by Instinet, an electronic agency securities broker, in June 1994. In 1996, Plaintiff applied for an available position in the Research and Analytics Sales Department – a position that had been publicized by an internal posting. Plaintiff was interviewed for the job and was told that the department was looking for someone with a Series 7 securities license. Plaintiff did not have a Series 7 securities license; the candidate ultimately hired for the position already had such a license. Later in 1996, Plaintiff sought and received a transfer to the Trading Research Department as a trading research analyst.

Plaintiff complains that, during the course of her employment, several of her co-workers made comments that she felt were racially derogatory. Specifically, Plaintiff complains that on two separate occasions in or about February 1997 two of her coworkers – Chris Kwiatkowski and Sal Arnuk – made comments to her about watermelons. She believes these comments were made because of her race.

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Plaintiff claims to have reported the comment by Mr. Kwiatkowski to Dorit Zeevie, the Vice-President of her department. (Fuller Aff. ¶ 11). In November 1998, Mr. Arnuk referred to Plaintiff as a "nobody." Plaintiff reported this comment to Ms. Zeevie, the Manager of her Department, Linda Giordano, and Dan Rosenthal and Karen Mohr, who were responsible for equal opportunity matters at Instinet. Plaintiff informed Mr. Rosenthal during a December 1998 meeting that she felt Mr. Arnuk had made this comment because of her race. The matter was reported to Mr. Arnuk's supervisor, who agreed that the comment was "rude" and "shouldn't have been said." (Fuller Dep. at 228-29). Mr. Arnuk was reprimanded, and he left a message on Plaintiff's voicemail apologizing for his comment.

In January 1999, Ms. Giordano spoke to Plaintiff and one of her co-workers, both of whom had been labeled "low performers," as part of a concerted efforted to address performance issues and keep a "track record" of these two individuals. (Pl. Ex. D). Plaintiff alleges that these efforts to "track" her performance were in retaliation for her complaint about Mr. Arnuk's comment.

Plaintiff retained her present counsel in 1999. Plaintiff's counsel sent a letter to Instinet on July 27, 1999, in which they informed Defendant of Plaintiff's claims of unlawful employment practices and suggested that a "mutually satisfactory resolution of this situation, short of litigation," was possible.

On or about August 16, 1999, Plaintiff received a performance review, which contained several negative

comments. At the time of the review, Plaintiff was awarded a bonus and was given no indication that her bonus had been reduced because of her performance. Although performance reviews were, until that time, conducted on a yearly basis, beginning in 1999, performance reviews were conducted every six months. (Giordano Dep. at 13-14). Plaintiff resigned on August 19, 1999 after receiving this review, claiming that she was constructively discharged. (Fuller Aff. ¶ 56).

Plaintiff filed a discrimination and retaliatory charge with the EEOC in or about August 1999. Because the EEOC was unable to resolve Plaintiff's charge within 180 days, it provided Plaintiff with a right to sue letter on or about September 15, 1999. (Compl. ¶ 5). Plaintiff brought this action on October 30, 1999, on behalf of herself and others similarly situated, *i.e.*, "blacks and Hispanics and other minorities" who were employed by Instinet from 1995 to the date of her motion.[1] (Compl. at ¶ 16). This Court denied class certification in an order dated November 26, 2001. Plaintiff appealed the denial of class certification; her appeal was dismissed.

DISCUSSION

I. Plaintiff's Motion to Compel

Plaintiff's motion to compel requests the Court to direct Defendant to provide (1) names and addresses of all putative class members, dating back to 1989; (2) affidavits of all

1. The claims of a co-plaintiff, Ortez Taylor, were dismissed pursuant to a Stipulation and Order of Dismissal, dated April 24, 2000.

employees with access to employment databases and hiring practices, in order to establish whether any documents or data was destroyed.[2]

A. Names and Addresses

Plaintiff moves to compel the production of the names and addresses of "all putative class members." Plaintiff argues that she needs this information so that all putative class members may receive notice that this Court denied the motion to certify this action as a class action. Plaintiff relies upon an opinion by Judge Posner, *Culver v. City of Milwaukee*, 277 F.3d 908 (7th Cir. 2002), in support of this motion.

In *Culver*, the Seventh Circuit held that class members must receive notice of a class decertification. The *Culver* Court also opined that putative class members should be notified when a class action suit is dismissed before the class is certified. 277 F.3d at 914. Plaintiff relies on this language – which is dicta – for the proposition that putative class members in this suit must receive notice that the Court denied class certification. The Court finds this argument unpersuasive.

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2. Plaintiff also appears to seek discovery of the names and addresses of (a) the current and former presidents of Instinet, and (2) the employees who were responsible for the maintenance of Instinet's hiring and employment database and records. Plaintiff offers no reason why she did not make these requests during the discovery phase of this matter, nor does she make any arguments in her Memorandum in support of these requests. These requests are also denied.

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As an initial matter, the Plaintiff cites no authority for the proposition that putative class members must be notified of a denial of class certification. Unlike the class members in *Culver*, no prospective class members received any notification of class certification, which would induce them to rely upon this action to protect their interests. Furthermore, requiring notification when a class action suit is dismissed pursuant to a settlement before the class is certified "protect[s] the members of a class in class action litigation from lawyers for the class who may, in derogation of their professional and fiduciary obligations, place their pecuniary self-interest ahead of that of the class." *Reynolds v. Benefit Nat'l Bank*, 288 F.3d 277, 279 (7th Cir. 2002) (Posner, J.) Neither of these concerns is present in this case. Plaintiff's motion is denied.

B. Affirmations Concerning the Handling of Documents and Data

Plaintiff seeks to compel the Defendant to provide affirmations from all Instinet employees who "had control over records and data" regarding her claims. Plaintiff bases this motion on an argument that the deposition testimony of certain Instinet employees contradicted representations made by Plaintiff's counsel to the Magistrate Judge during discovery. As an initial matter, the Court notes that these concerns should have been addressed to the Magistrate Judge during discovery, not to this Court one year after the close of discovery and contemporaneous to Defendant's motion for summary judgment. Furthermore, the Court has reviewed the relevant deposition statements and representations made to the Magistate Judge during discovery and finds no

contradiction, let alone any evidence to suggest that Defendant destroyed documents in contravention of discovery rules. Plaintiff's motion is denied.

II. Defendant's Motion for Summary Judgment

Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). In deciding a summary judgment motion, a court must resolve all ambiguities and draw all inferences in favor of the non-moving party. *Byrnie v. Town of Cromwell, Bd. of Educ.*, 243 F.3d 93, 101 (2d Cir. 2001). However, "purely conclusory allegations of discrimination, absent any concrete particulars," are insufficient to defeat a summary judgment motion. *Cameron v. Cmty. Aid for Retarded Children, Inc.*, 335 F.3d 60, 63 (2d Cir. 2003) (quoting *Meiri v. Dacon*, 759 F.2d 989, 998 (2d Cir. 1985).

A. Failure to Promote or Transfer

In order to show a prima facie case of failure to promote or transfer, a plaintiff must allege that: 1) she is a member of a protected class; 2) her job performance was satisfactory; 3) she applied for and was denied promotion or transfer to a position for which she was qualified; and 4) the position remained open and the employer continued to seek applicants. *See Cruz v. Coach Stores, Inc.*, 202 F.3d 560, 565 (2d Cir. 2000). Here, the position in the Research and Analytics Sales Department was the only position for which Plaintiff applied and was denied. Plaintiff herself states that she was told that the department was looking for someone with a Series 7

securities license. Plaintiff did not have her Series 7 securities license, and the candidate ultimately hired for the position already had such a license. Plaintiff has failed to establish that she applied for any other positions and was denied. Defendant's motion for summary judgment with respect to Plaintiff's failure to promote claim is granted.

B. Other Racial Discrimination Claims

In her complaint, Plaintiff also alleges that she was assigned less desirable tasks than white employees (Compl. at ¶ 6) and that she received less compensation than white employees with less education and experience. (Compl. at ¶ 9). Plaintiff has provided no evidence to support a claim of discrimination regarding assignments; Defendant's motion for summary judgment is therefore granted with respect to this claim.

In order to establish a prima facie case of unequal pay under Title VII, a plaintiff must show (1) the employer pays different wages to employees of different ethnic backgrounds; (2) the employees perform equal work on jobs requiring equal skill, effort, and responsibility; (3) the jobs are performed under similar working conditions; and (4) a showing of discriminatory intent. *See Belfi v. Prendergast*, 191 F.3d 129, 135 (2d Cir. 1999) (prima facie showing for Equal Pay Act claims); *see also Lavin-McEleney v. Marist College*, 239 F.3d 476, 483 (2d Cir. 2001) (Equal Pay Act and Title VII must be construed in harmony; however Title VII disparate treatment claim requires a showing of discriminatory intent, while an Equal Pay Act claim does not).

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The only evidence offered in support of Plaintiff's claim of unequal compensation is the Plaintiff's own statement that

> I found in the waste bin of the copy room the salaries of many if not all Instinet employees. Looking at the list of salaries I saw, that considering my background, that [sic] I had been given one of the lowest starting salaries and my salary continued to be low in comparison to other non-minority employees.[3]

(Fuller Aff. ¶ 39). Plaintiff has failed to provide the Court with a copy of this document she claims to have found in the waste bin. More to the point, Plaintiff, in her affidavit, does not make any claims whether the non-minority employees whom she claims to have higher salaries (a) perform equal work on jobs requiring equal skill, effort, and responsibility, or (2) perform jobs under similar working conditions. Thus, Plaintiff has failed to establish a prima facie case of unequal pay, and Defendant's motion for summary judgment on this claim is dismissed.

C. Hostile Work Environment

To establish a hostile work environment claim, plaintiff must advance evidence sufficient to permit a reasonable juror to find that the "workplace is permeated with discriminatory intimidation, ridicule, and insult . . . that is sufficiently severe

3. Plaintiff also relies upon salary data produced by Instinet. This Court has previously consided this data and Plaintiff's contention that it supports her claim of racial discrimination. This argument was rejected in this Court's Order denying class certification.

or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993) (citations omitted).

> [The] mere utterance of an . . . epithet which engenders offensive feelings in an employee does not sufficiently affect the conditions of employment to implicate Title VII. For racist comments, slurs, and jokes to constitute a hostile work environment, there must be more than a few isolated incidents of racial enmity, meaning that instead of sporadic racial slurs, there must be a steady barrage of opprobrious racial comments.

Schwapp v. Town of Avon, 118 F.3d 106, 110,111 (2d Cir. 1997) (internal quotations and citations omitted).

Here, Plaintiff alleges that the two comments made to her about watermelons and the comment that she was a "nobody" created a hostile work environment. Although these comments were certainly inappropriate, they cannot be characterized as "a steady barrage of opprobrious racial comments."[4] Because the Court finds that Plaintiff has failed to establish a hostile work environment, Defendant's motion for summary judgment is granted.

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4. Plaintiff also appears to allege that she witnessed her co-workers make "remarks regarding the sexual body parts of minority women." (Fuller Aff. ¶ 14). However, she offers no particular facts to support this conclusory allegation, thus it is insufficient to survive a motion for summary judgment.

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D. Retaliation

Plaintiff appears to present two claims of retaliation: first, that her supervisors began to keep a "track record" of her job performance after she complained about a co-worker's comment to her; second, that she received a negative performance review – which she claims resulted in her constructive termination – after her attorneys contacted Instinet regarding her discrimination claims.

To sustain a claim for retaliation, a plaintiff must first present sufficient evidence to make out a prima facie case that (1) she engaged in protected activity; (2) her employer was aware of this activity; (3) her employer took adverse action against her; and (4) a causal connection exists between the protected activity and the adverse action. *Cifra v. GE*, 252 F.3d 205, 216 (2d Cir. 2001). Plaintiff is unable to show that Instinet took any adverse action against her, thus Defendant's motion for summary judgment is granted.

A negative employment evaluation, unless accompanied by some additional adverse result, does not constitute an adverse employment action. *Valentine v. Standard & Poor's*, 50 F. Supp. 2d 262, 283 (S.D.N.Y. 1999) (collecting cases). *A fortiori*, the decisions to document an employee's performance – *i.e.*, create a "track record" – cannot, by itself, constitute an adverse employment action.

Plaintiff tries to show that she suffered some harm beyond a negative employment evaluation by stating that after she received her negative performance evaluation in August 1999, she "considered [her]self constructively discharged and

handed in [her] letter of resignation on August 19, 1999."[5] (Fuller Aff. ¶ 56). However, Plaintiff has failed to state a claim of constructive discharge. A person is considered constructively discharged when her employer, rather than discharging her directly, intentionally creates a working environment so intolerable that she is forced to quit. *Terry v. Ashcroft*, 336 F.3d 128, 151-52 (2d Cir. 2003). It is already well established in this Circuit that receiving a negative performance evaluation – even if the employee believes the negative evaluation is unwarranted – does not constitute constructive discharge. *See, e.g., Chertkova v. Connecticut Gen. Life Ins. Co.*, 92 F.3d 81, 89 (2d Cir. 1996) ("a disagreement with management over the quality of an employee's performance will not suffice to establish constructive discharge"); *Katz v. Beth Israel Med. Ctr.*, 2001 WL 11064, *14 (S.D.N.Y. Jan. 4, 2001) ("An employee is not constructively discharged because she does not like her assignments, receives unfair criticism, or is yelled at by supervisors."). As Plaintiff cannot show constructive discharge and has failed to show any other adverse employment action, she has failed to make a prima facie case of retaliation.

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5. Plaintiff also tries to characterize her evaluation as *including* an adverse result, stating that a Defendant must prove that her negative evaluation "would not be hindrance to Ms. Fuller either advancing herself at Instinet or in getting a positive recommendation to a new employer." (Pl. Mem. at 15). Plaintiff is attempting to shift her burden. *Plaintiff* must prove that her employer took adverse action against her in order to make out a prima facie case of retaliation.

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CONCLUSION

Plaintiff's motion to compel the production of certain information is denied. Defendant's motion for summary judgment is granted. The Clerk of the Court is directed to close this case.

SO ORDERED:

s/ Barbara S. Jones
BARBARA S. JONES
UNITED STATES DISTRICT JUDGE

Dated: New York, New York
January 26, 2004

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED NOVEMBER 26, 2001

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

99 Civ. 11453 (BSJ)

BERNADETTE FULLER, ORTEZ TAYLOR, and others similarly situated

Plaintiffs,

v.

INSTINET, INC.,

Defendant.

ORDER

BARBARA S. JONES
UNITED STATES DISTRICT JUDGE

Plaintiff Bernadette Fuller filed this action on behalf of herself and others similarly situated against Defendant Instinet, Inc. alleging, inter alia, that Instinet has engaged in a pattern and practice of unlawful discrimination and retaliatory conduct against blacks, Hispanics and other minorities at the company in violation of Title VII of the

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Civil Rights Act of 1964, 42 U.S.C. 2000e et seq.[1] Plaintiff now moves for an order certifying this case as a class action pursuant to Rules 23(a) and 23(a)(3) of the Federal Rules of Civil Procedure. Specifically, Plaintiff seeks certification of the following class: All blacks, Hispanics and other minorities who were employed by Instinet, Inc. from 1995 through the present. *See* Complaint ¶ 16. For the reasons stated below, Plaintiff's motion is DENIED.

BACKGROUND

Plaintiff Bernadette Fuller is a black woman formerly employed by Defendant Instinet. Fuller alleges that during her time at Instinet, she was discriminated against in numerous ways. For example, Plaintiff asserts that although she requested a promotion every year for five years, she was overlooked on each occasion, while less qualified and less senior white employees were promoted. *See Compl.* ¶ 6. Plaintiff also alleges that despite ample qualifications and repeated requests, on more than one occasion she was denied transfer to a different department within Instinet. *Id.* Within her department, Plaintiff claims that she has been assigned less desirable tasks than her white co-workers, and that although she has consistently excelled in her performance of these tasks, she has been denied an equal opportunity to advance to positions or increased responsibility and greater exposure to the firm's institutional clients. *Id.* at ¶¶ 6-8.

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1. Although Ortez Taylor originally was named as a plaintiff, he was dismissed from this action pursuant to a Stipulation and Order of Dismissal dated April 24, 2000.

Appendix C

In addition to her complaints regarding her inability to ascend within the company's ranks, Plaintiff asserts that nonminority employees with less education and experience have received larger salaries and bonuses than she has. *Id.* at ¶¶ 9-10, 12. Finally, Plaintiff claims that after seeking legal advice regarding Instinet's allegedly discriminatory activities, she immediately was subjected to retaliation within the company; in particular, she received a "poor, demeaning and insulting" review. *Id.* at ¶ 12. Plaintiff claims that this retaliatory action gave her no alternative but to resign from Instinet. *Id.*

According to Plaintiff, her individual experience was part of a larger pattern and practice at Instinet of systematically excluding blacks, Hispanics and other minorities from employment opportunities. In particular, Plaintiff alleges that Instinet has engaged in such unlawful discriminatory and retaliatory conduct as: (1) failing to provide promotion, transfer and job assignment opportunities to non-minorities on equal basis as is provided to whites; (2) tolerating discriminatory employment practices after being put on notice of their existence; (3) failing to act to remedy known discriminatory conduct, such as demeaning non-minorities and excluding them from policy-making positions; (4) assigning non-minorities to less desirable tasks; and (5) retaliation against blacks who have sought the assistance of attorneys regarding discrimination complaints. *Id.* at ¶ 4.

Appendix C

DISCUSSION

To qualify for class certification, Plaintiff first must prove that the putative class action meets each of the four requirements set forth in Federal Rule of Civil Procedure 23(a): (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class. *See In re Visa Check/MasterMoney Antitrust Litigation*, 2001 WL 1242717, *3 (2d Cir. 2001); *see also Caridad v. Metro-North Commuter Railroad*, 191 F.3d 283, 291 (2d Cir. 1999) (party seeking to certify a class bears the burden of demonstrating numerosity, commonality, typicality and adequacy). This court cannot certify the proposed class unless it is persuaded, "after a rigorous analysis, that the prerequisites of Rule 23 (a) have been satisfied." *Caridad*, 191 F.3d at 291 (*quoting General Telephone Co. v. Falcon*, 102 S. Ct. 2364 (1982) (hereinafter Falcon)).[2]

Plaintiff Cannot Represent Hispanics And Other Minorities

Plaintiff, a black woman formerly employed at Instinet, seeks to represent a class consisting of "blacks, Hispanics

2. In addition to fulfilling each of the requirements of Rule 23(a), a plaintiff seeking class certification must also demonstrate that the action qualifies under at least one of the categories set forth in Rule 23(b). *See* 2001 WL 1242717, *3. Because Fuller has not proven compliance with each element of Rule 23(a), however, this court need not consider whether this action qualifies under any of the Rule 23(b) categories.

and other minorities." Compl. ¶ 16. It is well-settled, however, that "a class representative must be part of the class and possess the same interest and suffer the same injury as the class members." *Falcon*, 102 S. Ct. at 2370 (internal quotations omitted). Because Ms. Fuller is black and not Hispanic or otherwise a minority, she lacks standing to bring any of the claims presently asserted in a representative capacity on behalf of Hispanic or other non-black minority employees. *See id.*; *see also Gavenda v. Orleans County*, 1997 WL 251543, *1 (W.D.N.Y. 1997) .

Plaintiff Has Not Proven There Exists An Aggrieved Class

Regardless of whether the proposed class is narrowed to include only black employees, Plaintiff's motion still must be denied because she has failed to demonstrate the existence of an aggrieved class.

Although racial discrimination is by definition class discrimination, the allegation that such discrimination has occurred is by itself insufficient to justify certification under Rule 23. *Falcon*, 102 S. Ct. at 2370. "Conceptually, there is a wide gap between (a) an individual's claim that he has been denied a promotion on discriminatory grounds, and his otherwise unsupported allegation that the company has a policy of discrimination, and (b) the existence of a class of persons who have suffered the same injury as that individual, such that the individual's claim and the class claims will share common questions of law or fact and that the individual's claim will be typical of the class claims. (For an individual seeking class certification) to bridge that gap, he must prove

much more than the validity of his own claim." *Id.* at 2370-71. Thus, critical to proving commonality and typicality in a discrimination case is demonstrating the existence of an "aggrieved class." *See id.* at 2370 n.13; *Sheehan v. Purolator, Inc.*, 839 F.2d 99, 102 (2d Cir. 1988) (affirming denial of class certification on the ground of lack of class-wide proof of an aggrieved class).

A plaintiff may establish the existence of aggrieved individuals in the purported class through affidavits from employees alleging discriminatory treatment or through other evidence, including statistical evidence, establishing the existence of an aggrieved class. *See Sheehan v. Purolator, Inc.*, 103 F.R.D. 641, 648 (E.D.N.Y. 1984), *aff'd* 839 F.2d 99 (2d Cir. 1988); *Ross v. Nikko Securities*, 133 F.R.D. 96, 96-97 (S.D.N.Y. 1990). To support her claim that an aggrieved class exists that shares common questions of law or fact, Fuller offers the expert report of sociologist Richard Faust, as well as her own affidavit. Because this court concludes that Faust's report is fatally flawed, and because Fuller's affidavit standing alone is insufficient to establish the existence of an aggrieved class, Fuller's motion for class certification must be denied.

This court is aware that a motion for class certification is "not an occasion for examination of the merits of the case," and that in deciding such a motion, a district court "may not weigh conflicting expert evidence or engage in statistical dueling of experts." *See In re Visa Check/MasterMoney*, 2001 WL 1242717, *5. At the same time, however, a district court must ensure that the basis of the expert opinion "is not so flawed that it would be inadmissible as a matter of law."

Id.; *see also Cruz v. Coach Stores. Inc.*, 1998 WL 812045, at *4 n.3 (S.D.N.Y.) (disregarding expert report submitted in support of motion for class certification because the report was "fatally flawed"), *aff'd in part, vacated in part on other grounds*, 202 F.3d 560 (2d Cir. 2000). The question before this court, therefore, is "whether plaintiff's expert evidence is sufficient to demonstrate common questions of fact warranting certification of the proposed class." *See In re Visa Check/MasterMoney*, 2001 WL 1242717, *5. The answer in this case is no.

Plaintiff's expert, Richard Faust, analyzes two sets of data concerning Instinet's employees' occupational positions and salaries. The first set, which pertains to the years 1994 through 1999, consists of statistical charts showing the racial and ethnic breakdown of Instinet's employees into nine occupational groups. *Faust Report* at ¶ 9.[3] The second set of data consists of a computer database of 1,306 employees with their race code, current occupational title, current salary and occupational and salary histories. *Id.* at ¶ 10. From this data, Faust selected four specific occupational positions to analyze in detail in terms of their racial composition and salaries.

Faust organizes this data into two correlation charts: The first chart indicates both the race distribution of Instinet employees by year and the occupational distribution by race for the years 1994-1999. The second, which is organized by

3. Faust combined the last four occupational categories to account for the small number of employees contained within each, and then converted the raw numbers provided by Instinet into percentages in order to facilitate the comparison of different racial groups. *Faust Report* at ¶ 6.

occupation position, indicates the current and starting salaries for Instinet employees by race. *Id.* at Exs. A & B. On each chart Faust identifies disparities that exist between white and Hispanic employees, and white and black employees. Based on his analysis of this information, Faust concludes (1) that the disparities in representation of Black and Hispanics in the higher occupational groups in Instinet are substantial and real in the years studied, and (2) that within specific occupational positions at Instinet, Black and Hispanic employees have lower current salaries than whites and these disparities are statistically significant. *Id.* at ¶¶ 21, 34-35.[4]

Faust's analysis does not assist Plaintiff in establishing that there exists an aggrieved class in this case. Faust merely examines the *correlation* between race and occupational position on one hand, and race and salary on the other; he does nothing to demonstrate that race is the cause of the existing disparities. Specifically, his analysis fails to take into account factors such as education, prior work experience and years of service at Instinet. Nor does Faust account for the racial make-up of the applicant pool for particular occupational positions within Instinet. Faust's failure to control for relevant nondiscriminatory factors renders his analysis fatally flawed.[5] *Sheehan*, 839 F.2d at 103; *Ross*, 133

4. Faust's conclusion that a particular disparity is "real" or "statistically significant" is based on his application of the chi-square test of statistical significance. *Id.* at ¶ 17. According to Faust, where the results of this test show statistical significance, "the conclusions is that the disparities could not have arisen by random chance, accident or happenstance." *Id.* at ¶ 16.

5. The flaws in Faust's analysis are exemplified by the following statement: "In this case, since race is the source of the disparities, (Cont'd)

F.R.D. at 97 (rejecting plaintiff's statistical evidence where statistics "merely compared the relative number of men and women in various job titles and failed to offer the relevant comparisons of similarly situated female and male employees (i.e., female and male employees with the same qualifications and experience)") (internal quotations omitted); *Cruz*, 1998 WL 812045, *4 n.3 (finding expert report fatally flawed where "the expert's analysis does not control for non-discriminatory factors and makes no distinctions for education, prior job history or job level") (internal quotations omitted). *See also Caridad*, 191 F.3d at 292-93 (reversing district court's rejection of expert report where expert controlled for various factors one would expect to be relevant to the analysis, and finding that expert report, in conjunction with the anecdotal evidence submitted by Plaintiffs, sufficed to demonstrate commonality).

The only other evidence submitted by Plaintiff to support her claim that there exists an aggrieved class is her own affidavit. This affidavit alone, however, is insufficient to demonstrate the existence of an aggrieved class. *See Sheehan*, 839 P.2d at 103 (district court did not err in finding that submitting an affidavit from only one aggrieved employee other than the named plaintiffs was insufficient to establish a class of aggrieved individuals); *Ross*, 133 F.R.D. at 97 (plaintiffs failed to demonstrate the existence of an aggrieved

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(Cont'd)

statistical significance would indicate that race, not accident or chance, was indeed the source of the disparities." *Id.* at ¶ 16. Yet without controlling for other potential causes such as education level and years of experience, there is no way to know whether race in fact is the source of the disparities.

class where plaintiffs' motion for certification of a class comprising nearly 200 females rested on the sworn allegations of the named plaintiffs and only one putative class member).

In sum, because Plaintiff has presented no evidence – either statistical, anecdotal or otherwise – to demonstrate "the existence of a class of persons who have suffered the same injury as that individual, such that the individual's claim and the class claims will share common questions of law or fact and that the individual's claim will be typical of the class claims," Plaintiff's motion for class certification must be denied. *See Falcon*, 102 S. Ct. at 2370-71.

CONCLUSION

For the reasons set forth above, this court DENIES Plaintiff's motion for class certification.

SO ORDERED:

s/ Barbara S. Jones
BARBARA S. JONES
UNITED STATES DISTRICT JUDGE

Dated: New York, New York
November 26, 2001